No. 851

In the Supreme Court of the United States

October Term, 1944.

ELLA HAUSER THATCHER,
Petitioner,

vs.

KATHERINE REBECCA BLACKER and TAYLOR B. WEIR, Executor of the Last Will and Testament of Samuel T. Hauser, deceased,
Respondents.

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF

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ARGUMENT

I.

REPLY TO RESPONDENTS' "SUPPLEMENTAL STATEMENT OF THE CASE".

(Respondents' Brief, pp. 4-6)

Relying upon Section 11 of Article VIII of the Montana Constitution and Section 10328 Revised Codes of Montana, 1935, respondents contend that the "same questions of fact and law" which are involved in this case are before the state court in the matter of the probate of the Hauser will and the administration of Mr. Hauser's estate. Any question involved in that contention is entirely immaterial in the matter before this Court for, as stated

in McClellan v. Carland, 217 U. S. 274, 282, when controversies between citizens of different states arise:

> "the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case."

However, in order to avoid any misunderstanding or confusion raised by such contention, we believe it well to point out that the questions of law and fact involved in this case are not pending in the state court.

Section 11 of Article VIII of the Montana Constitution provides that, as to all cases where the amount involved exceeds the sum of fifty dollars "the district courts shall have original jurisdiction," and Section 10328 provides how and to whom a distribution of the estate of a deceased person shall be made.

In Chadwick v. Chadwick, 6 Mont. 566, 577, 13 Pac. 385, 386, the court decided that a probate court did not have jurisdiction of a petition involving the construction of a will. It said "We think the construction of this will is within the peculiar province of a court of equity". That case was decided before Montana became a state, but, in 1903, fourteen years after the adoption of the State Constitution, in Davidson v. Wampler, 29 Mont. 61, 67, 74 Pac. 82, 84, the court, referring to the Chadwick and other later cases, and to the jurisdiction of district courts sitting in probate, said:

> "These latter cases also recognize the rule that when, under the Constitution, the jurisdic-

tion of these courts was transferred to the district courts, it was not enlarged, but it was the same as theretofore, though exercised by courts of general jurisdiction."

See also:

3 Bancroft's Probate Practice, p. 1892, where the Chadwick case is cited.

Respondents also contend that the petition for writ of certiorari should be peremptorily denied on the ground that it is contrary to justice for a non-resident to voluntarily go into the Federal Court "anticipating a different result than would be reached in the State Court" (Resps. Br. p. 5). Such a contention is groundless for, where diversity of citizenship exists, a litigant has the absolute right to go into the Federal Court. Payne v. Hook, 7 Wall. 425, & Kline v. Burke Construction Co., 260 U. S. 226.

Respondents have overlooked the fact that your petitioner went into the Federal Court relying on the rule announced in Erie R. Co. v. Tompkins, 304 U. S. 64. She assumed that, as a matter of right, the result would be the same as if she had gone into the state court. Her reason for presenting the Petition for Writ of Certiorari is that the result was not the same as it would have been in the state court.

Respondents' argument clearly illustrates that if the decision of the Circuit Court of Appeals in this case is allowed to stand, it will be an invitation to non-residents of Montana to resort to the Federal Courts in cases of this kind 'anticipating a different result than would be reached in the State

Court". This is the very basis of Reason II relied on by petitioner for allowance of the writ (Petition, p. 7).

II.

REPLY TO RESPONDENTS' CONTENTION THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH SECTION 7021 R. C. M., 1935.

(Respondents' Brief, pp. 6-8).

Without citing any authority, respondents contend that Section 7021 only prohibits a "clear and distinct bequest" from being "whittled away" or "cut down" and that it does not prohibit the enlargement of such a bequest. We believe and respectfully submit that the authorities cited at pages 13 to 16 of petitioner's original brief conclusively establish the fact that the words "cannot be affected", as used in Section 7021, mean cannot be *enlarged* or diminished.

Respondents also say that Section 7021 has never been construed by the Montana courts. However, this did not relieve the Circuit Court of Appeals from applying that Section in its construction of the will in this case. Meredith v. City of Winter Haven, 320 U. S. 228 (Adv. Op. p. 6). See Petitioner's original brief, p. 14.

The balance of respondents' argument as to Section 7021 is so specious as to need no reply. There can be no question but that the bequest:

"I give to Katherine Rebecca Blacker all

household furniture, table ware pictures, silverware, & jewelery."

is clear and distinct within the meaning of Section 7021, and that it is the only bequest or devise, clear or otherwise, contained in the will.

III.

REPLY TO RESPONDENTS' CONTENTION THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION IN IN RE McLURE'S ESTATE, 63 MONT. 536, 541.

(Respondents' Brief, pp. 8-11).

Respondents, apparently, contend that Secs. 7016 to 7054 of the Revised Codes of Montana, 1935, contain all of the rules for construction of wills. They say:

> "The Montana codes (1935) contain 39 sections (7016 to 7054), setting out the commonly accepted rules for construction of wills,"
> (Resps'. Br., 8)

Upon this premise respondents then contend that the rule quoted from the decision in In re McLure's Estate, 63 Mont. 536, 541, 208 Pac. 900, 902, to the effect that the construction of a will which will disinherit heirs "is not to be favored unless the 'intention' of the testator is so expressed in clear and unequivocal language", is not the law of Montana.

They have overlooked the fact that the Montana Code "recognizes the continuance of the common law", "that the codification does not embrace the whole body of the law", and that "The rules of the

common law are not to be overturned except by clear and unambiguous language". State ex rel. La Point v. District Court, 69 Mont. 29, 34, 220 Pac. 88, 89. As pointed out at pages 19 and 20 of petitioner's original brief, the rule referred to was a part of the common law.

Respondents also contend that the rule quoted from the McLure case, upon which petitioner relies, is not the law of Montana because the question of the interpretation of the will was only "incidental" (Resps'. Br., p. 9). In the McLure case the court declared that rule in deciding that the widow became entitled to the personal property under the will and that, consequently, Sec. 10068 of the Revised Codes of Montana, 1921, which provides that relatives of the deceased are "entitled to administer only when they are entitled to succeed to his personal estate," did not apply.

In Montana Horse Products Co. v. Great Northern Ry. Co., 91 Mont. 194, 210, 7 Pac. (2d) 919, 925, the Court said:

> "All that is necessary to make a decision of this court authoritative is that there shall appear to have been an application of the judicial mind to the precise question adjudged and that the point was fully considered."

And in Union P. R. Co. v. Mason City & Ft. D. R. Co., 199 U. S. 160, 166, this Court said:

> "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere *dictum*."

Respondents also claim that:

> "The petition here fails to point out wherein the decision here is in conflict with the body of rules of construction of wills for which the McLure case holds." (Resps. Br., p. 11)

Petitioner does not contend that the decision of the Circuit Court of Appeals is in conflict with the "body of rules of construction of wills for which the McLure case holds". There are several rules referred to in that case which can have no application in this case. The rule announced in the McLure case with which the decision of the Circuit Court of Appeals is in conflict is that a will should not be construed so as to disinherit heirs at law

> "unless the 'intention' of the testator is so expressed in clear and unequivocal language."

IV.

REPLY TO RESPONDENTS' CONTENTION THAT THERE IS "NO ISSUE OF ESSENTIAL FACT LEFT TO BE TRIED UNDER THE DECISION OF THE CIRCUIT COURT OF APPEALS."

(Respondents' Brief, pp. 11-14)

Under the above title Respondents contend that:

> "By its decision, the Circuit Court has decided this case upon appellants' (respondens') motion to dismiss the complaint for failure to state a claim upon which relief may be granted," (Resps. Br., p. 12)

By this action petitioner sought a construction of the Hauser will. By its decision the District Court denied respondents' motion to dismiss and granted

petitioner's motion for judgment on the pleadings (R. 41). Thereafter, the District Court entered judgment in favor of petitioner, wherein it adjudged that, under the will, Respondent Blacker

> "was bequeathed the household furniture, tableware, pictures, silverware and jewelry, and no more; and as to the rest, residue and remainder of his property, the said Samuel T. Hauser died intestate."

It was from this judgment that the respondents appealed to the Circuit Court of Appeals (R. 45-46), and it was this judgment which was reversed by that Court (R. 71).

The opinion of the Circuit Court of Appeals discloses that that Court did not decide the case upon the motion to dismiss. It sustained the jurisdiction (R. 62-66). It also sustained the sufficiency of the complaint for it construed the will and decided the case upon the merits (R. 66-70). While, of course, an Appellate Court may consider the question of jurisdiction and the sufficiency of the complaint upon an appeal, it is certain that the Circuit Court of Appeals did not decide this case upon Respondents' motion to dismiss.

A further and complete answer to respondents' contention is that an order denying a motion to dismiss, which motion is based upon the insufficiency of the complaint, is not appealable.

This is so fundamental as to hardly need citation of authorities but, to illustrate our point, we invite the Court's attention to Central Vermont Trans. Co.

v. Durning, (C. C. A. 2) 71 Fed. (2d) 273, 274, where the court said:

> "So far as the order appealed from denied the motion to dismiss the bill, it is not now subject to review because it is not final and the cause is still open for trial on the pleadings."

If the Circuit Court of Appeals had decided the case upon respondents' motion to dismiss the complaint for failure to state a claim upon which relief could be granted, the only decree or judgment which it could enter or direct the District Court to enter is a judgment dismissing the complaint. The decree in this case reverses the judgment of the District Court and directs that Court "to make findings and to enter judgment in harmony with the opinion of this Court". Under that mandate the District Court cannot enter a judgment of dismissal for such a judgment would not be in harmony with the opinion of the Circuit Court of Appeals.

* * * * * * * * *

Commingled with respondents' argument on the foregoing contention is their statement that:

> "the complaint alone was in question and the allegations of the answer could not have been considered by the Court, and, therefore, could not have been the basis for or material to the decision." (Resps. Br., p. 12)

Not only was it necessary for the Court to consider the allegations of the answer upon an appeal from a judgment on the pleadings, but the record conclusively shows that it did so. In its opinion the Court says: "The answer contains affirmative mat-

ter bearing on the circumstances of the testator's life", and then proceeds to summarize those allegations. (R. 60). It also said: "The situation of the testator and the circumstances of his life when the will was drawn are entirely consistent with this construction". (R. 70).

* * * * * * * * *

Respondents also contend that, in denying the petition for rehearing, the Circuit Court of Appeals necessarily held that the affirmative matters alleged in the answer are not material. The Court denied the petition for rehearing without stating any reasons therefor (R. 74), and since it had treated the affirmative allegations of the answer as material in construing the will, as disclosed by its opinion, there is no basis whatever for assuming that it had changed its opinion with reference to the materiality of those allegations. Its opinion is the law of the case.

* * * * * * * * *

In conclusion, we respectfully submit that the Petition for Writ of Certiorari should be granted.

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